MAJLIS PERBANDARAN SHAH ALAM A

v.

MENARA BIRU SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
HAMID SULTAN ABU BACKER JC
[CIVIL APPEAL NO: R2-25-224-2008]
15 JULY 2009

ARBITRATION: *Arbitrator - Removal, application for - Grounds of misconduct and bias - Principles applicable - Interests of justice - Publishing of arbitrator's award - Arbitration Act 1952, ss. 24, 34* C

This was an application by the applicant to remove the arbitrator pursuant to s. 24 of the Arbitration Act 1952 ('Act') on the grounds of misconduct, bias *etc* ('encl. 1'). The other incidental applications filed by both the applicant and the 1st respondent were encls. 8, 12 and 21. The 1st respondent, the claimant in the arbitration proceedings, was the contractor to the applicant for a certain project. Disputes arose and the arbitrator was appointed by KLRCA, to which both parties consented. The arbitration proceeded with directions given by the arbitrator according to KLRCA rules, though there was a dispute as to which year's rules applied. The applicant raised the issue of the arbitrator's purported unsatisfactory conduct. The hearing was completed and the 1st respondent filed its submission. The applicant, however, did not do so and obtained an *ex parte* injunction restraining the arbitrator from publishing his award. D E F

Held (dismissing encl. 1; encls. 8, 12 and 21 accordingly struck out): G

(1) Enclosure 1 must be dismissed for, *inter alia*, the following reasons: (i) the applicant had set out serious allegations against a distinguished person and arbitrator without putting his complaints from time to time by letter to the arbitrator. Making the arbitrator a party did not cure this defect since the arbitrator, a disinterested party to the dispute between the applicant and the 1st respondent, need not defend himself; (ii) the applicant's complaints related to procedural matters and the arbitrator's conduct. The arbitrator has wide discretion on the conduct of the proceedings and the courts will not H I

ordinarily disturb the arbitrator's procedural conduct. Further, the court will not ordinarily remove the arbitrator; (iii) in addition, the court should not entertain procedural skirmishes before the arbitrator; (iv) there was much merit in the 1st respondent's submission, on the facts, that s. 34 of the Act would apply. This issue would become much clearer if the arbitrator published his award; and (v) the interests of justice demanded the *status quo* be maintained in respect of the issue of s. 34 of the Act until the arbitrator published his award. Once that occurred, the applicant, if he deemed fit, could seek an appropriate remedy in a court of law. In consequence, the *ex parte* injunction was set aside to enable the arbitrator to publish the award immediately. (para 5)

Case(s) referred to:

Engineering Environmental Consultants Sdn Bhd v. Sime UEP Development Sdn Bhd (Suit No: R1-25-279-2007) (Unreported) ***(refd)***

Ranhill Bersekutu Sdn Bhd v. Safe Consulting Engineers & Anor [2004] 5 CLJ 343 HC ***(refd)***

Soh Beng Tee Co Pte v. Fairmount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 24, 34

For the appellant - Surjan Singh (Dato' Hakimi with him); M/s Hakimi & Partners

For the 1st respondent - S Murthi; M/s Murthi & Assoc

For the 2nd respondent - Ivan Loo

Reported by Suresh Nathan

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the applicant's application encl. 1 *inter alia* to remove the arbitrator pursuant to s. 24 Arbitration Act 1952 (AA 1952) on the grounds of misconduct, bias etc, and other incidental applications filed by the applicant as well as the respondent, briefly are as follows:

(i) Enclosure 8, the applicant's *inter parte*'s application against the 2nd defendant to injunct the 2nd defendant, arbitrator from proceeding.

(ii) Enclosure 12, the 1st respondent's application to intervene in the injunction proceedings against the 2nd defendant.

(iii) Enclosure 21, the 1st defendant's application to raise preliminary issues relating to s. 34 AA 1952 on the grounds that the arbitration was carried out pursuant to KLRCA rules as this court has no jurisdiction to hear the matter.

Brief Facts

[2] The respondent here is the claimant in the arbitration proceedings. The claimant was the contractor to the applicant in respect of a project pursuant to an agreement. Dispute arose and the arbitrator was appointed by KLRCA. Both parties consented. The arbitration proceeded with directions given by the arbitrator according to KLRCA rules, though there is a dispute 'which year's rules' applies. The applicant has set out the grievance – the purported unsatisfactory conduct of the arbitrator – in more than 29 pages. The 1st respondent has eloquently summarised the applicant's grievance into four complaints namely: (i) the arbitrator was biased to the applicant (ii) did not allow applicant's application for adjournment (iii) did not allow the applicant's counsel to complete the cross-examination of the 1st respondent's witness and (iv) had told the applicant and/or his counsel to leave the proceedings.

[3] The hearing was completed and the 1st respondent had filed their submission but the applicant did not file and the arbitrator was about to publish the award but could not do so because the applicant had obtained an *ex parte* injunction restraining the arbitrator to do so.

Preliminaries

[4] In this case the 1st respondent says that KLRCA rules apply but the applicant says otherwise. Further, the complaint of the applicant is relating to procedural matter which was not from time to time put in writing to the arbitrator to enable him to respond. It must not be forgotten that it is also part of natural justice to do so as the purported natural justice allegations are serious, if true. Further, the applicant's authorities are more relevant to setting aside an award and in this case the award has not been published.

[5] I have read the originating motion, relevant applications, affidavit, submission etc, I take the view the applicant's originating motion must be dismissed. My reasons *inter alia* are as follows:

(a) The applicant had set out serious allegation against a distinguished person and arbitrator without putting his complaints from time to time by letter to the arbitrator. Making the arbitrator as a party does not cure this defect as the arbitrator who is a disinterested party to the dispute between the applicant and the 1st respondent need not defend himself.

(b) The complaints of the applicant relate to procedural matters and conduct of the arbitrator who is the master of the proceedings. The arbitrator has wide discretion on the conduct of the proceedings. Counsels appearing before the arbitrator must act with due candour, courtesy, fairness and due respect to the position held by the arbitrator. The courts will not ordinarily disturb the procedural conduct of the arbitrator. I had dealt with this area of jurisprudence in the case of *Engineering Environmental Consultants Sdn Bhd v. Sime UEP Development Sdn Bhd* (Kuala Lumpur High Court Suit No.R1-25-279-2007). I do not wish to repeat the same here. Further, the court will not ordinarily remove the arbitrator. In *Soh Beng Tee Co Pte v. Fairmount Development Pte Ltd* [2007] 3 SLR 86 the Singapore Court of Appeal observed as follows:

> This judicial philosophy of minima interference is not only manifested in relation to an arbitrator's obligation to adhere to the principles of natural justice, but is also adhered to by our courts in addressing other types of challenges to arbitral awards. For instance, in deciding whether to remove an arbitrator in a domestic arbitration, Tay Yong Kwang J observed in *Anwar Siraj v. Ting Kang Chung* [2003] 2 SLR 287 at [41]-[42]: The arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice (see the *Handbook of Arbitration Practice* (3rd edn, 1998). A subjective lack of confidence in the arbitrator by one party is not a sufficient ground to remove him. The test is an objective one and there must exist real grounds for which a reasonable

> person would think there is a real likelihood that the arbitrator could not or would not fairly determine the issue on the basis of the evidence and the arguments to be adduced before him (*Hagop Ardahalian v. Unifert International SA (The "Elissar")* [1984] 2 Lloyd's Rep 84 at 89). It is therefore plaint that the Court's supervisory role is to be exercised with a light hand and that arbitrators' discretionary powers should be circumscribed only by the law and by the parties' agreement.

Similar principle was adopted in *Ranhill Bersekutu Sdn Bhd v. Safe Consulting Engineers & Anor* [2004] 5 CLJ 343.

(c) In addition, court should not entertain procedural skirmishes before the arbitrator. I have dealt with this area of jurisprudence in detail in the case of *Engineering Environmental Consultants Sdn Bhd v. Sime UEP Development Sdn Bhd.* (Kuala Lumpur High Court Suit No. R1-25-279-2007). I do not wish to repeat the same, save to repeat the following:

> I do not find any support within AA 1952 to permit the court to interfere on procedural decision of the arbitrator. I will go to the extent of saying that court should not lend any support for procedural skirmishes before the arbitrator to flourish as it will not be within the spirit and intent of the AA 1952.

(d) I find much merit in the 1st respondent's submission that s. 34 AA 1952 will apply, as the arbitration proceeded under KLCRA rules, and arbitrator was appointed by KLRCA, and that effectively will mean that KLRCA must have done so under the current rules ie, at the date of appointment of the arbitrator. This issue will become much clearer if the arbitrator publishes his award.

(e) On the facts of the case, I do not wish to decide on the issue of s. 34 at this stage. The interest of justice demands the *status quo* be maintained in respect of this issue until the arbitrator publishes the award. Once the arbitrator publishes the award, the applicant, if he deems fit, can seek appropriate remedy in court of law, (if any). In consequence, the *ex parte* injunction is set aside to enable the arbitrator to publish the award immediately.

[6] For reasons stated above, I dismiss the originating motion encl. 1 with costs. In consequence encls. 8, 12 and 21 have become academic and accordingly those applications are struck out with no order as to costs. The applicant to pay the 1st respondent fixed costs in the sum of RM10,000 in respect of encl. 1.

I hereby order so.